IN THE

Supreme Court of the United States

October Term, 1979

No. 79-397

LOUIS PIHAKIS and JEROME DAVIDSON,
Petitioners,

against

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioners pray that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, entered in the above entitled case on the 9th day of March, 1979, which affirmed judgments of conviction of the Southern District Court of New York (Stewart, J.D.) based upon findings of guilt by a jury.

The Petitioner Pihakis was convicted of three counts of mail fraud (18 U.S.C. 1343) one count of travel fraud (18 U.S.C. 2314) two counts of transportation fraud (18 U.S.C. 2314) and one count of perjury (18 U.S.C. 1623) and received a sentence of six years each on three counts and five years on the remaining counts; all to run concurrently with each other.

The Petitioner Davidson was convicted of one count each of mail, wire, travel and transportation fraud and received a

sentence of two years on each count; all to run concurrently with each other.

Opinion Below

The judgments of conviction of the District Court were affirmed by the Circuit Court whose opinion is included herein (Appendix "A").

Jurisdiction

The judgment of the Circuit Court was entered on the 29th day of June, 1979 (Appendix "A"). A petition for rehearing and rehearing en banc was denied by the Circuit Court on the 10th day August, 1979 (Appendix "B" and "C"). An application to stay issuance of the mandate and to continue bail was denied on July 18, 1979 (Appendix "D") and both petitioners are in confinement.

No extension of time has been granted within which to file this petition. Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1) and Rule Sec. 22(2).

Questions Presented

1. Did the trial judge err in refusing to identify the co-defendant who was the informant and to permit him to be examined with respect to whether he transmitted any defense strategy to the government agents or whether he purposefully intruded upon the attorney-client relationship?

Statement of The Case

During trial, it was discovered that a government informant (Agostino) had infiltrated the defense camp. A hearing

was held in which the informant testified that he was an informant as to other matters only and had not passed any defense information to the prosecutor.

During the Agostino informant hearing, defense counsel asked an F.B.I. agent who was on the stand whether anybody at the defense table was a government informant. Significantly, the witness answered, "Not in this case", thus leading to the correct conclusion that one of the defendants was a government informant in connection with other matters.

The Court refused to permit any inquiry as to the identity of such informant. Defense counsel then moved for permission to withdraw as counsel and for a mistrial. This application was denied by the Court.

A motion to set aside the jury verdict was heard and denied on sentence day. During the course of the oral argument it was disclosed to counsel for the very first time that the defendant Mayfield was the informant; that his first attorney had applied to and had been permitted by the Court to withdraw as counsel for that reason, outside the presence of other defense counsel; that the Judge and prosecutor were aware of that defendant informant's activities; that successor counsel was not so informed; and further that such co-defendant had been negotiating a plea bargain arrangement with the U.S. Attorney in Texas during the course of the prosecution's case, but did not sign it until the day after the prosecution had rested its case.

The prosecutor submitted a sealed affidavit in which he stated that he had received no information concerning this case from Mayfield.

Significantly the defendant-informant Mayfield did not appear at sentencing; presumably he is a fugitive.

The charges against Mayfield were more serious and voluminous than against the appellants, including an umbrella type conspiracy count which permitted the introduction of an abundance of evidence against him.

Statutes

§1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

§1343. Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the

purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

§2314. Transportation of stolen goods, securities, moneys, fraudulent State tax stamps, or articles used in counterfeiting

Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transports or causes to be transported, or induces any person to travel in, or to be transported in interstate commerce in the execution or concealment of a scheme or artifice to defraud that person of money or property having a value of $5,000 or more; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any falsely made, forged, altered, or counterfeited securities or tax stamps, knowing the same to have been falsely made, forged, altered, or counterfeited; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce any traveler's check bearing a forged countersignature; or

Whoever, with unlawful or fraudulent intent, transports in interstate or foreign commerce, any tool, implement, or thing used or fitted to be used in falsely making, forging, altering, or counterfeiting any security or tax stamps, or any part thereof—

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited or spurious representation of an obligation or other security of the United States, or of an obligation, bond, certificate, security, treasury note, bill, promise to pay or bank note issued by any foreign government or by a bank or corporation of any foreign country.

§1623. False declarations before grand jury or court

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty or perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

(b) This section is applicable whether the conduct occurred within or without the United States.

(c) An indictment or information for violation of this section alleging that, in any proceedings before or ancillary to any court or grand jury of the United States, the defendant under oath has knowingly made two or more declarations, which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false if—

(1) each declaration was material to the point in question, and

(2) each declaration was made within the period of the statute of limitations for the offense charged under this section.

In any prosecution under this section, the falsity of a declaration set forth in the indictment or information shall be established sufficient for conviction by proof that the defendant while under oath made irreconcilably contradictory declarations material to the point in question in any proceeding before or ancillary to any court or grand jury. It shall be a defense to an indictment or information made pursuant to the first sentence of this subsection that the defendant at the time he made each declaration believed the declaration was true.

(d) Where, in the same continuous court or grand jury proceeding in which a declaration is made, the person making the declaration admits such declaration to be false, such admission shall bar prosecution under this section if, at the time the admission is made, the declaration has not substantially affected the proceeding, or it has not become manifest that such falsity has been or will be exposed.

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

Constitutional Amendments

Amendment [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to

be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment [VI]

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for defence.

Reasons for Granting Writ

The Courts below ignored the constitutional rights of the petitioners to confrontation which was denied to them. The Circuit Court disregarded and overlooked the fact that the informant was not identified and was not subjected to interrogation at trial; that the prosecutor's sealed affidavit was not a substitute for a hearing and interrogation; that defense counsel should at least have the right to discover if the suspected informant had communicated any confidential matters to the prosecution, regardless of whether or not he was being primarily used as an informant in this case; that conversely, defense counsel had the right to determine for themselves if the informant purposefully intruded upon the attorney-client relationship, regardless of whether or not any information was communicated to the prosecution; that defense counsel should also have had the right to discover if any defendant was the informant even if only on other matters; and to explore the potential

conflict of interest posed by defendant working both as an informant for the government and as a member of the defense team even if on separate matters; that the failure of the Trial Court to disclose the identity of such informant and to conduct a hearing enabled such informant to flee, thereby depriving appellants of their right to question him concerning his activities as an informant; that a severance should have been granted when the Trial Judge first became aware of co-defendant Mayfield's activities as an informant; and that the informant may have passed information to persons in the government employ other than the prosecutor in the instant case.

The Courts below overlooked the fact that the Trial Court preempted the right of the petitioners to make such discovery for themselves and denied them the right of confrontation and ignored the fact that the petitioners are the ones who had the sole right to determine if there was conflict of interest, or if any defense strategy was passed on to the prosecution by a co-defendnat who was also a government informant, or if such informant was purposefully planted in this case, as a sham defendant or otherwise, regardless of whether or not any information was transmitted; and the fact that the only way the petitioners could have made such discovery was by disclosure of the informant's identity and an evidentiary hearing.

The Circuit Court did not give full force and effect and in fact misconstrued the case of *Weatherford v. Bursey,* 429 U.S. 545 (1977). The Circuit Court disregarded the recent decision of the 5th Circuit in *Stephens v. United States* 78-2637, which held that prejudice need not be demonstrated in a situation such as this, in which an actual conflict of interest has been established. That the case of *United States v. Mamone,* 543 F. 2d 457 (2d Cir. 1976) relied upon by the government and cited in the Circuit opinion is inapposite and inapplicable.

Under *Weatherford v. Bursey, (Supra),* it would appear that defense counsel at least should have had the right to discover if the suspected informant had communicated any confidential matters to the prosecution, regardless of whether or not he was being primarily used as an informant in this case. Conversely, defense counsel had the right to determine if the informant purposefully intruded upon the attorney-client relationship, regardless of whether or not any information was communicated to the prosecution. It should also be noted that defense counsel should have the right to discover if any defendant was the informant, even if only on other matters. This would distinguish the case from *Weatherford (Supra)* due to the potential conflict of interest posed by a defendant working for the government and as a member of the defense team, even if on separate matters.

This Court, in *Weatherford, (Supra)* also indicated that the case was distinguishable from one in which the government undertakes to intentionally intrude on the attorney-client relationship. This Court indicated that such a tactic would also be grounds for a mistrial, regardless of whether or not any actual knowledge was gained.

> "Moreover, this is not a situation where the State's purpose was to learn what it could about the defendant's defense plans and the informant was instructed to intrude on the lawyer-client relationship or where the informant has assumed for himself that task and acted accordingly. Weatherford, the District Court found, did not intrude at all; he was invited to the meeting, apparently not for his benefit but for the benefit of Bursey and his lawyer. App. 248. Weatherford went, not to spy, but because he was asked and because the State was interested in retaining his undercover services on other matters and it was therefore necessary to avoid raising the suspicion that he was in fact the informant whose existence Bursey and Wise already suspected."

429 U.S. at 557.

Defense counsel should have been given the opportunity to discover if any defense strategy was passed on to the prosecution by a co-defendant who was also a government informant or if such informant was purposefully planted in this case, as a sham defendant or otherwise, regardless of whether or not any information was transmitted. Counsel should also have been permitted to discover if any such defendant was an informant, even on other matters, because of the potential conflict of interest.

The identity of the informant should have been disclosed so that defense counsel could have been apprised of defense strategy or information furnished to such informant and in turn furnished by him to the government.

Furthermore, a hearing should have been held at which such informant should have been compelled to testify.

Petitioners contend that Mayfield's identity as the informant should have been disclosed at trial. The delay caused by the refusal to do so, enabled him to flee; thereby depriving petitioners of their right to inquire of him what information he may have passed to any government agent or whether he was a sham defendant. The trial court thereby deprived appellants of this right. Had the Trial Court promptly granted the motion, Mayfield's subsequent disappearance would not have affected their rights of due process.

Moreover a severance should have been granted when the Judge first became aware of Mayfield's activities as an informant. The appellants were thus prejudiced by the spillover from the voluminous charges against Mayfield, including conspiracy.

We fail to see why Mayfield, who was a co-defendant informant, was protected from inquiry, whereas Agostino, the non-defendant informant, was not so protected. Mayfield's role was the more venal and he should have been subjected to examination.

The sealed affidavit of denial by the prosecutor is not a substitute for a hearing and does not speak for the Texas prosecutor or F.B.I. agents in Texas to whom information may have been passed.

CONCLUSION

The issues above discussed are, it is submitted, of sufficient substantiality to require a review by the United States Supreme Court.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

IRWIN KLEIN, P.C.
Counsel for Petitioners

IRWIN KLEIN
Of Counsel

Appendix A—Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 29th day of June, one thousand nine hundred and seventy-nine.

Present:
HONORABLE WILFRED FEINBERG
HONORABLE WILLIAM H. TIMBERS
Circuit Judges
HONORABLE JACOB MISHLER
Chief District Judge,

UNITED STATES OF AMERICA,

Appellee,

-against-

LOUIS PIHAKIS, HERMAN NATHAN ROSENBERG and JEROME DAVIDSON,

Defendants-Appellants.

79-1120
79-1128-9

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of conviction of said District Court be and they hereby are AFFIRMED.

Louis Pihakis, Herman Nathan Rosenberg and Jerome Davidson

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 29th day of June, one thousand nine hundred and seventy-nine.

Present:

HONORABLE WILFRED FEINBERG
HONORABLE WILLIAM H. TIMBERS
Circuit Judges
HONORABLE JACOB MISHLER
Chief District Judge,

UNITED STATES OF AMERICA,

Appellee,

-against-

LOUIS PIHAKIS, HERMAN NATHAN ROSENBERG and JEROME DAVIDSON,

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79-1120, 79-1128-9

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ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgments of conviction of said District Court be and they hereby are AFFIRMED.

Louis Pihakis, Herman Nathan Rosenberg and Jerome Davidson appeal from judgments of conviction on various counts charging violation of federal statutes regarding fraud, 18 U.S.C. §§1341, 1343, 2314 and perjury, 18 U.S.C. §1623, entered in the United States District Court for the Southern District of New York, after a jury trial before Judge Charles E. Stewart, Jr. The prosecutions arose out of defendants' activities in connection with Kimberly Beers, Limited, an investment company that represented that it owned a huge portfolio of stocks, when in fact it owned very little stock. Kimberly Beers obtained advance fees from investors (in some cases issuing in return worthless trust receipts which it represented could be used as collateral for bank loans), but failed to deliver the promised stock. The evidence at trial, viewed in the light most favorable to the government, established that Pihakis, Rosenberg, Davidson and others acted as brokers or finders in connection with the Kimberly Beers scheme, introducting customers to the principals of Kimberly Beers.

Pihakis and Davidson argue that there was insufficient proof of their knowledge of the fraudulent nature of the Kimberly Beers operation, of their intent to defraud and of their participation in any common plan or scheme. The evidence summarized on pp. 7-18 of the government's brief is a more than adequate basis for the jury's verdict. The government's proof established that both Pihakis and Davidson continued to make promises concerning Kimberly Beers even after they had knowledge through personal experience that Kimberly Beers never fulfilled these promises.

Pikhakis and Davidson also argue that evidence of prior crimes should have been excluded. The government introduced judgments of conviction resulting from Pihakis' participation as a broker in two other advance fee fraud schemes, and testimony of witnesses that Davidson had participated as a broker in a fraudulent scheme involving claims that coal could be converted into precious metals. The evidence was admitted by the district court on the issue of defendants' knowledge and intent. Evidence of participation in other similar fraudulent schemes is clearly relevant to defendants' fraudulent intent to participate in the scheme at issue. See, e.g., United States v. DeFillipo, 590 F.2d 1228, 1240 (2d Cir. 1978). The government's timing of the introduction of this evidence was proper since it was admitted only after defendants had put knowledge and intent into the case through cross-examination of the government's witnesses. See United States v. Danzey, No. 78-1342, slip op. 1755, 1766-71 (2d Cir. March 19, 1979). The judge's conclusion that the prejudicial effect of the evidence did not substantially outweigh its probative value was not an abuse of discretion.

Appellants argue that they were deprived of a fair trial because two government informants were present during defense strategy sessions, armed marshals were present in the courtroom and a marshal overheard part of the jury deliberations. One of the alleged informants was Nicholas Agostino, a friend of several defendants; the other was David Mayfield, a co-defendant who was convicted of fraud, racketeering and conspiracy. As to the former, Judge Stewart held an evidentiary hearing. As to the latter, the government filed an affidavit that it received no information from the informant concerning this case and that he was a bona fide defendant at all times. The judge found that neither informant had been placed in the defense camp for the purpose of obtaining evidence about the instant case and that the government had not received any information from either concerning this case. Under these circumstances, we conclude that there was no violation of defendants' constitutional rights, see, e.g., Weatherford v. Bursey, 429 U.S. 545 (1977), and that the failure to hold an evidentiary hearing with respect to informant Mayfield was not reversible error. United States v. Mamone, 543 F.2d 457 (2d Cir. 1976).

The armed marshals, dressed in civilian clothing, were present in the courtroom for only a few brief intervals during a very long trial, and the jury was instructed that their presence had nothing to do with these defendants. Also, a marshal overheard a portion of the jury's verdict and reported this to a court reporter. The judge investigated the situation and correctly concluded that since the jury did not know of the purported leak, its deliberations were unaffected, and the breach of jury secrecy was harmless. We see no prejudice to defendants from these occurrences.

Pihakis and Rosenberg also attack their convictions for perjurious testimony before the grand jury investigating Kimberly Beers. Pihakis argues that certain of his perjurious answers were outside the scope of the grand jury investigation. This testimony concerned whether Pihakis made false representations to clients, who were later victims of the Kimberly Beers fraud, concerning other sources of funding. Since Pihakis used these other representations as a way to obtain money from clients which was passed on to Kimberly Beers or as a way of convincing them that he was a trustworthy broker, the statements were material to the investigation. Rosenberg argues that he should have been given a warning that he was a target of the investigation at the time he testified, and that his parole status at the time he was asked to testify prevented him from asserting his Fifth Amendment privilege. As to the latter argument, it is pure speculation that an attempt might have been made to revoke Rosenberg's parole on the basis of an assertion of his Fifth Amendment privilege. Moreover, his proper course was either to testify truthfully or to assert his Fifth Amendment

right of silence and then oppose as unconstitutional any government attempt to revoke his parole. He was not privileged to resort to the third alternative of lying. See, e.g., United STates v. Wong, 431 U.S. 174, 179-80.

As to the failure to give Rosenberg a target warning, failure to warn a grand jury witness that he is a potential target does not violate his Fifth Amendment rights. United States v. Washington, 431 U.S. 181 (1977). Rosenberg relies on United States v. Jacobs, 531 F.2d 87 (2d Cir.), vacated and remanded, 429 U.S. 909, original decision adhered to, 547 F.2d 772 (1976), cert. dismissed as improvidently granted, 436 U.S. 31 (1978), but that case is not in point, since it dealt with the disparity in practice between the United States Attorney and the Organized Crime Strike Force in the same district in giving target warnings. There is no such problem here. The government states that Rosenberg was not given the warning because he was not considered a target at the time he testified, and when the judge explored this matter in open court, the Assistant United States Attorney made this explicit representation in response to the judge's inquiry. This statement was supported by the government's warning to other key grand jury witnesses who were later indicted, which indicates that the government acted in good faith. Although the indictment against Rosenberg came within a relatively short period after he testified, this does not necessarily mean that he was then a target. In the absence of a stronger showing of bad faith, the district judge was entitled on this record to rely on the statement of the Assistant United States Attorney that Rosenberg was not viewed as a target when he was called to testify.

Davidson argues that a hearing or a new trial should have been granted because of an out-of-court recantation by the witness Jack Burns. But the substance of Burns's alleged recantation, confusion about the date on which Davidson made

statements indicating knowledge of the fraudulent nature of Kimberly Beers, was known prior to trial, and Davidson's attorney stressed this confusion to the jury in summation. The judge did not err in denying a new trial, see, e.g., United States v. Slutsky, 514 F.2d 1222, 1225 (2d Cir. 1975).

Finally, Rosenberg argues that his trial should have been severed from the trial of the other defendants and that the spillover prejudice from the evidence against him deprived him of due process. Since the defendants all were charged with acting as finders or brokers for Kimberly Beers and all were involved with the same Kimberly Beers' principals, a joint trial was permissible under Fed. R. Crim. R. 8(b). Moreover, the judge did not abuse his discretion in denying severance under Fed.R.Crim.P. 14. See, e.g., United States v. Stirling, 571 F.2d 708, 733 (2d Cir.), cert. denied, 47 U.S.L.W. 3221 (Oct. 2, 1978).

We have reviewed all of appellants' arguments and have found them to be without merit. The judgments of conviction are affirmed.

s/ Wilfred Feinberg
WILFRED FEINBERG

s/ William H. Timbers
WILLIAM. H. TIMBERS

Circuit Judges

s/ Jacob Mishler
JACOB MISHLER

Chief District Judge

APPENDIX B--DENIAL OF REHEARING

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the tenth day of August, one thousand nine hundred and seventy-nine.

Present:

HON. WILFRED FEINBERG,
HON. WILLIAM H. TIMBERS,
Circuit Judges,
HON. JACOB MISHLER,
Chief Judge, District Court

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

HERMAN NATHAN ROSENBERG, LOUIS M. PIHAKES, JEROME DAVIDSON,
Defendants-Appellants.

79-1120, 79-1128, 79-1129

A petition for a reharing having been filed herein by counsel for the appellants, Louis M. Pihakis and Jerome Davidson

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

A. DANIEL FUSARO,
Clerk.
By: Sara Piovia
Deputy Clerk

EXHIBIT C--DENIAL OF REHEARING EN BANC

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 18th day of July, one thousand nine hundred and seventy-nine.

United States of America,
Appellee,

v.

Louis Pihakis, Herman Rosenberg and Jerome Davidson,
Defendants-Appellants.

79-1120

It is hereby ordered that the motion made herein by counsel for the appellants Louis Pihakis and Jerome Davidson dated Ju-

ly 11, 1979 to stay issuance of the mandate and continue bail pending determination of the petition for a writ of certiorari to the Supreme Court of the United States in the event the petition for rehearing filed herein is denied be and it hereby is DENIED.

s/ Wilfred Feinberg
WILFRED FEINBERG

s/ William H. Timbers (uf)
WILLIAM H. TIMBERS, Circuit Judges

s/ Jacob Mishler (uf)
JACOB MISHLER
Chief District Judge

APPENDIX D—DENIAL OF STAY OF MANDATE AND CONTINUANCE OF BAIL

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the TENTH day of August, one thousand nine hundred and seventy-NINE.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

HERMAN NATHAN ROSENBERG, LOUIS M. PIHAKIS, JEROME DAVIDSON,
Defendants-Appellants.

79-1120, 79-1128, 79-1129

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendants-appellants, Louis M. Pihakis and Jerome Davidson, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

s/ Irving R. Kaufman
IRVING R. KAUFMAN, Chief Judge